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In the Supreme Court of the United States

OCTOBER TERM, 1994

B & W INVESTMENT PROPERTIES AND LOUIS WOLF,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether pre-suit notification was required before the United States initiated civil enforcement actions against petitioners under the Clean Air Act, 42 U.S.C. 7413(b)(3) and (4) (1988), for violations of the Act's hazardous air pollutant requirements, 42 U.S.C. 7412(c), and the Act's recordkeeping and reporting requirements, 42 U.S.C. 7414.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12), as modified (Pet. App. 14-15), is reported at 38 F.3d 362.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1994. A petition for rehearing was denied on December 2, 1994 (Pet. App. 14-15). The petition for a writ of certiorari was filed on Febru-

ary 27, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Air Act authorizes the Administrator of the Environmental Protection Agency (Administrator) to publish a list of hazardous air pollutants that "cause[], or contribute[] to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." 42 U.S.C. 7412(a)(1) and (b).[1] The Administrator is also required to prescribe national emission standards for such hazardous air pollutants (NESHAP), which must be set at a level that provides an ample margin of safety to protect the public health. 42 U.S.C. 7412 (b)(1)(B). When it is not feasible to prescribe or enforce emission standards, the Administrator may promulgate work practice standards prescribing specific procedures for handling hazardous air pollutants. 42 U.S.C. 7412(e)(1).

In 1971, the Administrator designated asbestos as a hazardous air pollutant pursuant to Section 7412. 36 Fed. Reg. 5931. A major source of airborne asbestos is demolition and renovation activities where insulation containing asbestos is stripped or removed from structures and pipes. The Administrator first issued an asbestos NESHAP in 1973. 38 Fed. Reg.

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[1] The Clean Air Act was amended in November 1990. See Pub. L. No. 101-549, 104 Stat. 2399. The events at issue occurred prior to that date. Therefore, the district court and the court of appeals applied pre-amendment law, except for a post-amendment provision that mitigated punishment. Pet. App. 1 n.1. Unless otherwise noted, all references to the Act in this brief are to the Act before the 1990 amendments.

8820. It regulates emissions of airborne asbestos by establishing work practice standards for handling and disposing of asbestos during asbestos stripping and removal activities. The Environmental Protection Agency (EPA) has authorized the State of Illinois to implement and enforce the asbestos NESHAP pursuant to 42 U.S.C. 7412(d)(1), while retaining authority to bring an action itself for any NESHAP violation under 42 U.S.C. 7412(d)(2). The 1984 version of the asbestos NESHAP (49 Fed. Reg. 13,658) applies to the renovation activities in this case, and is published at 40 C.F.R. Pt. 61, Subpt. M, Sections 61.140-61.156 (1989).[2]

The asbestos NESHAP requires owners and operators[3] of renovation projects to follow specific "work

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[2] The asbestos NESHAP defines "renovation" in relevant part as "altering in any way one or more facility components" (40 C.F.R. 61.141 (1989)); "facility component" as "any pipe, duct, boiler, tank, reactor, turbine, or furnace at or in a facility; or any structural member of a facility" (*ibid.*); and "facility" as "any institutional, commercial, or industrial structure, installation, or building (excluding apartment buildings having no more than four dwelling units)" (*ibid.*). The asbestos NESHAP was revised and repromulgated in November 1990 (55 Fed. Reg. 48,406).

[3] An "owner or operator" is defined in the general NESHAP regulations to include "any person who owns, leases, operates, controls, or supervises a stationary source." 40 C.F.R. 61.02 (1989). The Act defines "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant." 42 U.S.C. 7411(a)(3). The general provisions of the NESHAP regulations further define "stationary source" as "any building, structure, facility or installation which emits or may emit any air pollutant which has been designated as hazardous by the Administrator." 40 C.F.R. 61.02 (1989).

practice standards" when a renovation operation involves stripping or removing at least 260 linear feet of friable asbestos materials from pipes, or at least 160 square feet of friable asbestos materials from other facility components. 40 C.F.R. 61.145(d), 61.147, 61.152 (1989).[4] The standards require that friable asbestos materials be sufficiently wet when they are being stripped from facility components, unless EPA waives this requirement (40 C.F.R. 61.147 (c) (1989)), and that friable asbestos materials that have been removed or stripped must be sufficiently wet and remain wet until they are collected for disposal. 40 C.F.R. 61.147(e) (1989).

Emitting an air pollutant in violation of a NESHAP by a stationary source is a violation of 42 U.S.C. 7412(c). The Administrator is authorized to commence a civil action seeking injunctive relief, or a civil penalty "of not more than $25,000 per day of violation, or both, whenever such person * * * violates * * * section 7412(c)." 42 U.S.C. 7413(b)(3).

The Administrator is authorized by 42 U.S.C. 7414 (a) to establish reporting requirements applicable to owners and operators of emission sources subject to various requirements promulgated under Section 7412, including the asbestos NESHAP, to enable EPA to determine whether an owner or operator has violated Section 7412. Accordingly, the asbestos NESHAP requires each owner and operator of a renovation operation to provide EPA with timely, advance written notice of the intention to renovate a facility. 40 C.F.R. 61.145, 61.146(b)(4) (1989).

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[4] "Friable asbestos material" is defined as "any material containing more than 1 percent asbestos by weight that hand pressure can crumble, pulverize, or reduce to powder when dry." 40 C.F.R. 61.141 (1989).

When a renovation operation involves stripping or removing at least 260 linear feet of friable asbestos materials from pipes, or at least 160 square feet of friable asbestos materials from other facility components, written notice regarding the renovation must be given as early as possible before renovation begins. 40 C.F.R. 61.145, 61.146(b)(4), 61.146(c) (1989). The Administrator is authorized to commence a civil action seeking injunctive relief, or a civil penalty "of not more than $25,000 per day of violation, or both, whenever such person * * * fails or refuses to comply with any requirement of section 7414." 42 U.S.C. 7413(b)(4).

The Clean Air Act also provides for the Administrator to establish national primary and secondary ambient air quality standards. 42 U.S.C. 7409. States are required to adopt, and to submit for EPA approval, a state implementation plan. 42 U.S.C. 7410. An implementation plan must provide for the implementation, maintenance, and enforcement of the national primary and secondary air quality standards promulgated by the Administrator. The enforcement procedures for violations of "any requirement of an applicable implementation plan," 42 U.S.C. 7413(a)(1) and (b)(2)—*i.e.*, any requirement of a state implementation plan for national primary and secondary ambient air quality standards, see 42 U.S.C. 7410(d)—differ from the procedures in Section 7413(b)(2) for violations of Sections 7412 and 7414. Under Section 7413(a)(1), the Administrator is required to notify a person found to be in violation of "an applicable implementation plan," and if the violation extends beyond the 30th day after the date of notification, the Administrator may act to enforce the finding either by issuing an administrative order

requiring compliance or by initiating a civil action under Section 7413(b)(2).[5]

2. In 1989, petitioner Louis Wolf purchased approximately 5.5 acres of property in Cicero, Illinois, that includes four buildings. Pet. App. 3. In May 1990, the undeveloped portion of the property was leased by Wolf's colleague Albert Berland, as an agent for petitioner B & W Investment Properties, Inc. (B & W), to David Moss for use as a storage lot. *Ibid.* Berland entered into an agreement to sell Moss the property, subject to removal of asbestos from the buildings, after which Berland hired a contractor to remove the asbestos. *Id.* at 3-4.

EPA was not given notice of this renovation work prior to the contractor's initiation of the work on August 10, 1990. Pet. App. 4. EPA investigators went to the site on August 27 and 31, 1990, following receipt of an anonymous tip concerning the renovation activities at the site. The investigators discovered at the site large quantities of unwetted friable asbestos which was capable of becoming airborne near the adjacent commuter rail stop. They also noted a general lack of security at the site including open doors, broken windows, a hole in the roof, and the absence of warning signs to alert individuals to the danger of asbestos exposure. *Ibid.*

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[5] The 1990 amendments to the Clean Air Act incorporated the amended provisions governing procedures for violations of an applicable implementation plan, previously found in subsections (b)(1) and (b)(2), in a new subsection (b)(1). See 42 U.S.C. 7413(b)(1) (Supp. V 1993). The 1990 Act incorporated the amended provision governing civil enforcement actions for violations of Sections 7412 and 7414, previously found in subsection (b)(3), in a new subsection (b)(2). See 42 U.S.C. 7413(b)(2) (Supp. V 1993).

On August 30, 1990, EPA served Berland with an administrative order which outlined the inspectors' findings, required cessation of the renovation activities, and stated the steps required to bring the property into compliance with the relevant laws. Pet. App. 27-34. Wolf, as agent for B & W, subsequently hired a contractor to perform the necessary cleanup work, which commenced on January 21, 1991 and was completed March 13-15, 1991. *Id.* at 4.

3. On September 16, 1991, the United States initiated a civil enforcement action against Louis Wolf and B & W alleging violations of the Clean Air Act, specifically Sections 7412 and 7414, and the asbestos NESHAP, and seeking civil penalties against each defendant and permanent injunctive relief. Pet. App. 16-25. The district court granted the government's motion for summary judgment, concluding that Wolf and B & W were jointly and severally liable under the Act and regulations for the violations. The court accepted a magistrate judge's penalty recommendation and reduced Wolf's liability based on his ability to pay, and assessed no fine for the violation of Section 7414. Pet. App. 5.

4. The court of appeals affirmed. Pet. App. 1-12. The court held that Section 7413(b) did not require the United States to give notice before initiating its asbestos NESHAP enforcement action because presuit notification is required only in actions to enforce state implementation plans under the Act and is not required in actions to enforce Section 7412(c) (NESHAP violations) or Section 7414 (notice violations). Pet. App. 5-8. The court also ruled that the district court did not err in finding B & W liable as an "owner or operator" of the subject property, and did not abuse its discretion regarding the penalty im-

posed or in rejecting defendants' effort to admit as evidence an internal EPA memorandum. *Id.* at 8-12. The court denied Wolf's and B & W's petition for rehearing with suggestion for rehearing en banc, and amended a portion of one sentence in its opinion. *Id.* at 14-15.

ARGUMENT

Petitioners assert (Pet. 9-13) that the court of appeals erred in affirming the district court's determination that the United States was not obligated under 42 U.S.C. 7413(b)(2) to serve Wolf and B & W with a notice of the Section 7412(c) NESHAP violation and the Section 7414 reporting violation in advance of instituting this civil enforcement action for those violations. Petitioners contend (Pet. 10) that this case involves alleged violations of a state implementation plan, because "the Administrator had delegated to the State of Illinois his authority to implement and enforce both asbestos removal [42 U.S.C. sec. 112(d)(1) [*sic*]] and asbestos reporting requirements [42 U.S.C. sec. 114(b)(1) [*sic*]]." Accordingly, in petitioners' view, this civil enforcement action was unlawful because Wolf and B & W received no pre-suit notice as required by Section 7413(b)(2) prior to initiation of a civil action for violations of a state implementation plan, which then may proceed only "if there is a compliance failure 30 days after the date of notice to that person." Pet. 10.

Petitioners' contentions are not supported by any appellate decision and are contradicted by the terms of the Act. The Act provides that the pre-suit notification requirements apply only to claims of violations of "any requirement of an applicable implementation plan." 42 U.S.C. 7413(a)(1) and (b)(2).

Petitioners err by assuming (Pet. 10) that the term "applicable implementation plan" includes the authority delegated to the State of Illinois under Section 7412(d) to enforce Section 7412 NESHAP violations, and under Section 7414(b) to carry out the reporting requirements of Section 7414.

Contrary to petitioners' assumption, the Act's definition of the term "applicable implementation plan" does not include state procedures developed and submitted to the Administrator under Section 7412 (d)(1) "for implementing and enforcing emission standards for hazardous air pollutants for stationary sources located in such State," or state procedures developed and submitted to the Administrator under Section 7414(b)(1) "for carrying out" Section 7414's requirements in the State. Rather, Section 7410(d) expressly limits the use of the term "applicable implementation plan" to a state implementation plan for national primary and secondary ambient air quality standards approved or promulgated under Section 7410:

> For purposes of this chapter, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) of this section or promulgated under subsection (c) of this section and which implements the requirements of this section.

42 U.S.C. 7410(d).

Accordingly, the notification requirements in Section 7413(a)(1) and (b)(2) have no application here. This case involves enforcement of Sections 7412(c) and 7414, and does not involve enforcement of "an applicable implementation plan," as Congress

defined that term "[f]or purposes of" the Clean Air Act. As explained above, Section 7413(b)(3) provides for the initiation of a civil enforcement action for violations of Section 7412(c), and Section 7413 (b)(4) provides for the initiation of a civil enforcement action for violations of Section 7414. Neither subsection (b)(3) nor (b)(4) contains any pre-suit notification requirement.

In these circumstances, the court of appeals correctly held that "the Act imposes no duty on the EPA to provide notice of violations of section [7412] before commencing an action for injunction or civil penalties." Pet. App. 6. As the court explained,

> [T]he EPA did not rely on the enforcement provision of section 113(b)(2) [7413(b)(2)]. In fact the EPA could not, because section 113(b)(2) which concerns violations of state implementation plans for ambient air quality standards, by its terms does not apply to regulation of hazardous air pollutants. There are no ambient air quality standards for hazardous air pollutants such as asbestos. 42 U.S.C. § 7412 (" 'hazardous air pollutant' means an air pollutant to which no ambient air quality standard is applicable").

Ibid.

Nor, finally, are petitioners correct in suggesting (Pet. 10) that the Administrator had no authority to initiate enforcement actions for violations of Section 7412(c) or Section 7414, because he had delegated to the State authority to enforce the Section 7412 asbestos NESHAP and authority to carry out Section 7414. Subsection (d)(1) of Section 7412 provides for delegation of the Administrator's enforcement authority to a State that meets the provision's condi-

tions for such delegation, but subsection (d)(2) expressly reserves concurrent enforcement authority in the Administrator:

> Nothing in this subsection shall prohibit the Administrator from enforcing any applicable emission standard under this section.

42 U.S.C. 7412(d)(2). Similarly, subsection (b)(1) of Section 7414 permits delegation of the Administrator's authority to "carry out" Section 7414 to a State that meets the provision's conditions for such delegation, but subsection (b)(2) expressly reserves concurrent authority in the Administrator to carry out this authority in the State:

> Nothing in this subsection shall prohibit the Administrator from carrying out this section in a State.

42 U.S.C. 7414(b)(2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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